

November 9, 2016

Ex Parte Notice

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143; *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593

Dear Ms. Dortch:

On behalf of Windstream Services, LLC (“Windstream”), I respond to Verizon’s ex parte letter of October 31, 2016, and USTelecom’s ex parte letter of November 4, 2016.¹ Neither of these letters presents compelling reasons for why the Commission should not buttress the complaint process outlined in the Chairman’s Fact Sheet of October 7, 2016 to give full meaning to the Fact Sheet’s proposal that “[w]holesale rates are presumptively unreasonable if they exceed retail rates for like services.”²

In particular, the Commission should make clear that this proposal will compare the price of last-mile connectivity used in a finished input to the price of the same when offered on a standalone wholesale basis. This apples-to-apples comparison can be achieved by subtracting the costs (including capital) of all inputs other than the business data service from the price of a finished service the ILEC sells to an end user – i.e., the price of the business data service input as determined in accordance with the Parity Pricing Principle explicated by Prof. Robert Willig.³

¹ See Letter from Curtis L. Groves, Assistant General Counsel, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 05-25, RM-10593 (filed Oct. 31, 2016) (“Verizon Oct. 31, 2016 Ex Parte”); Letter from Jonathan Banks, Senior Vice President, Law & Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 05-25, RM-10593 (filed Nov. 4, 2016) (“USTelecom Nov. 4, 2016 Ex Parte”).

² *Chairman Wheeler’s Proposal to Promote Fairness, Competition, and Investment in the Business Data Services Market*, FCC at 2 (Oct. 7, 2016) (“Fact Sheet”), https://ecfsapi.fcc.gov/file/104304546943/ExParte_re_BDS_Wholesale_11.04.16_jb_krs.pdf

³ See Declaration of Dr. Robert Willig ¶ 9 (“Willig Declaration”), appended as Attachment B to Reply Comments of Windstream Services, LLC on the Further Notice of Proposed Rulemaking, WC Docket Nos. 16-143, 05-25, RM-10593 (filed Aug. 9, 2016) (“Windstream

This measure offers *no* discount to wholesale purchasers; instead, it only ensures wholesale and retail purchasers pay the same amount for last-mile access. To do otherwise would presume that all costs for network beyond the last-mile access, customer support, assistance with network design, hardware and software implementation, and retail-specific sales costs are zero – which is patently not the case, as Windstream has shown by producing its own cost data.⁴

I. The Parity Pricing Principle Is an Administrable Measure that Will Provide a Much-Needed Response to Large ILECs’ Anticompetitive Price Squeezes.

A clear rule is needed to limit the ability of market leaders to use their market power over bottleneck last-mile facilities to squeeze out rivals in downstream markets for business communications solutions. In particular, while incumbents have not been transparent in disclosing their retail rates, Windstream and others have found and provided the Commission evidence of ILECs’ charging competitive providers prices for last-mile Ethernet inputs that are equal to or greater than the prices charged to end users for substantially the same capacity,⁵ even

Aug. 9, 2016 Reply Comments”). Consistent with the *ex parte* letter filed jointly by Windstream and the Ad Hoc Telecommunications Users Committee (“Ad Hoc”), when using the term “wholesale” here, we are including any purchaser unaffiliated with the ILEC of BDS as an input, as distinguished from purchasing BDS as part of a finished service. *See* Letter from Colleen Boothby, Counsel to Ad Hoc Telecommunications Users Committee, and John T. Nakahata, Counsel to Windstream, to Marlene H. Dortch, Secretary, FCC, at 4, WC Docket Nos. 16-143 and 05-25, RM-10593 (filed Nov. 3, 2016) (“Windstream and Ad Hoc Letter”).

⁴ *See* Declaration of David Schirack, Mike Baer and Samuel Bushey ¶¶ 7-11 (“Schirack/Baer/Bushey Declaration”), appended as Attachment C to Windstream Aug. 9, 2016 Reply Comments.

⁵ *See* Comments of Windstream Services, LLC, WC Docket Nos. 16-143, 05-25, RM-10593 at 15-16, 41-42 (filed June 28, 2016) (“Windstream June 28, 2016 Comments”) (summarizing Windstream’s experience facing price squeezes for Ethernet inputs); Second Declaration of Matthew J. Loch ¶ 19, attached to Comments of TDS Metrocom, LLC, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) (stating that “the wholesale rates available to TDS CLEC are typically higher” than ILEC retail rates, and that “[t]his is the case for various bandwidths generally in demand by the SMB customers . . . and in some cases *even more so* for bandwidths in excess of 100 Mbps” (emphasis added)); Declaration of James A. Anderson ¶¶ 20-23, attached Comments of XO Communications, LLC on the Further Notice of Proposed Rulemaking, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) (discussing XO’s experience with price squeezes when purchasing “Type II,” or off-net inputs). *See also* *Business Data Services in an Internet Protocol Environment; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, FCC 16-54,

though an ILEC incurs fewer costs when providing service to a carrier customer than to an end-user finished services customer, and wholesale customers are generally making large volume commitments.⁶

Adopting the Parity Pricing Principle is an appropriate response to these anticompetitive practices. There should not be disagreement that in a market that is not approaching perfectly contestability, the Parity Pricing Principle is an appropriate means for ascertaining whether the ILEC is effectively charging its retail customers less for like connectivity than it charges to wholesale customers. This Principle helps ensure that ILEC prices for critical BDS inputs comply with Section 202(a)'s prohibition against unreasonable discrimination. As Prof. Willig explained, pricing in this manner addresses unreasonable discrimination "by essentially imputing the bottleneck input price at the level at which a [vertically integrated] firm is really charging itself for providing the bottleneck input to its retail customers."⁷ Indeed, in the book he co-authored with Prof. Baumol, Mr. Sidak concludes that "[t]he pricing of interconnection should be governed by the efficient component-pricing rule [also known as the Parity Pricing Principle], to ensure that competition is not undermined by input-price discrimination, including discrimination by the [I]LEC in its own favor."⁸

It is undisputed that both ILECs and CLECs provide finished business communications solutions. These complete, retail solutions include last-mile business data services connectivity as well as a host of design and customer-interfacing services, and value-added features that could be provided by the input supplier or a competitor purchasing the bottleneck input and adding these other services. When the input is a bottleneck input – as Windstream and many other commenters prove to be the case for last-mile access – then even when a competitive provider is more efficient and innovative in combining the business data service with other inputs to deliver a more attractive finished communications solution to customers, the competitive provider can still be foreclosed from competing in that downstream market as a result of the bottleneck owner's pricing for business data service connectivity.⁹ Where the business data service is such a bottleneck input, the remedy is to price the input according to the Parity Pricing Principle.¹⁰

31 FCC Rcd. 4723, 4888 ¶ 442 (2016) ("*FNPRM*") (noting that the competitive providers' "allegations raise concerns that are not novel").

⁶ See Windstream Aug. 9, 2016 Reply Comments at 35-36; Schirack/Baer/Bushey Declaration ¶¶ 10-11; Declaration of David Schirack and Mike Baer ¶ 8, appended as Attachment A to Windstream June 28, 2016 Comments.

⁷ Willig Declaration ¶ 25.

⁸ William J. Baumol and J. Gregory Sidak, *TOWARD COMPETITION IN LOCAL TELEPHONY* 122 (1994). Interconnection in that context was access to the ILEC network, including the use of loops. *Id.*

⁹ See Willig Declaration ¶ 18.

¹⁰ See *id.* ¶ 25.

As Windstream has previously explained, the incorporation of the Parity Pricing Principle as a backstop to protect competition in the face of ILECs remaining the largest supplier of business data services in their ILEC service territories need not address every implementation detail upon adoption to have meaningful benefits for competition.¹¹ While Windstream would prefer a rule, adopting the Parity Pricing Principle as part of the presumption for assessing when an ILEC's wholesale rates exceed its implicit retail charge for like connectivity would help guide commercial negotiations and could enable parties to reach agreement without the need to file a complaint.¹² The Commission has recognized in the context of voice and data roaming that a regulatory framework, like this one, can have a productive impact on commercial negotiation.¹³

In addition, contrary to Verizon's suggestion, many retail specific costs are ascertainable. Although Verizon dismisses them as just Windstream's costs, Windstream has put information on the record concerning both its retail enterprise and its wholesale sales costs. These are clearly identifiable separate cost components of retail finished products and wholesale inputs, respectively. As set forth in the Declaration of David Schirack, Mike Baer and Samuel Bushey, "Retail sales costs dwarf carrier sales costs as a percentage of recurring revenues."¹⁴ Windstream has specifically put its average third-party retail commissions in the record, as well as the much smaller amount of wholesale sales related personnel expenses, which Verizon or

¹¹ Letter from John T. Nakahata, Counsel to Windstream, to Marlene H. Dortch, Secretary, FCC, at 2, WC Docket Nos. 16-143 and 05-25, RM-10593 (filed Oct. 21, 2016) ("Windstream Oct. 21, 2016 Ex Parte").

¹² Indeed, companies have multiple sources of evidence to guide them in their commercial negotiations pursuant to this framework. For example, companies can look generally to prevailing channel partner compensation in the industry, which could serve as a proxy for costs of some retail operations avoided when selling to wholesale customers.

¹³ See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Declaratory Ruling, DA 14-1865, 29 FCC Rcd. 15,483, 15,493 ¶ 31 (Wireless Telecomms. Bur. 2014) (concluding that providing "additional guidance" on what constitutes commercial reasonableness "will facilitate the ability of parties to negotiate successful data roaming agreements"); *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, FCC 11-52, 26 FCC Rcd. 5411, 5412 ¶ 2 (2011) ("[I]n order to facilitate the negotiation of data roaming arrangements, we provide guidance on factors that the Commission could consider when evaluating any data roaming disputes that might be brought before the agency."); *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, FCC 10-59, 25 FCC Rcd. 4181, 4191 ¶ 19 (2010) ("Our expectation is that, with the revised rule adopted in this Order setting out an underlying obligation to provide automatic roaming, we have laid the foundation to enable carriers to successfully negotiate reasonable roaming arrangements . . .").

¹⁴ Schirack/Baer/Bushey Declaration ¶ 9.

other ILECs could also easily ascertain.¹⁵ This could equally be seen if one were simply to examine the headcount assigned to retail enterprise sales, which far exceeds the headcount for carrier sales. For these reasons, USTelecom's assertion that "there is no reason to believe that current BDS rates reflect 'significant' costs associated with the sale, marketing and support of 'retail' business data services" is simply wrong.¹⁶ And unless the Parity Pricing is followed – which accounts for wholesale-specific costs as part of calculating the appropriate input price – Windstream or any other wholesale business data input service provider that combines BDS with its own inputs will be in the position of "paying twice" for these significant costs, contrary to USTelecom's unsubstantiated claims.¹⁷

II. Verizon's Position that the Parity Pricing Rule Should Be Avoided if Not Needed Everywhere Would Result in Harm to the Great Majority of Enterprise, Government, Educational, and Healthcare Customers.

Verizon tries to confuse the matter by suggesting that a precondition for adopting retail-wholesale pricing guidance is a Commission finding that market failures are experienced at each and every location in the nation.¹⁸ This is an absurd strawman because there is no evidence that business data services are sold in a "nationwide market." Indeed, business data service markets are hyper-local, with the ILECs themselves pricing on a building-by-building basis.¹⁹ Verizon itself euphemistically states, "[T]he compromise framework Verizon and INCOMPAS developed earlier this year acknowledged some markets are more competitive than others"²⁰ Indeed, any other conclusion would run contrary to the demonstrable facts in the record: Of all business data service locations, 77 percent have only the ILEC as a provider, and when limited to

¹⁵ See *id.*

¹⁶ USTelecom Nov. 4, 2016 Ex Parte at 2.

¹⁷ *Id.*

¹⁸ Verizon Oct. 31, 2016 Ex Parte at 1 (arguing the Parity Pricing Principle should not be applied to business data services because no provider has "nationwide market power").

¹⁹ See Letter from John T. Nakahata, Counsel to Windstream, to Marlene H. Dortch, Secretary, FCC, at 8, WC Docket Nos. 16-143, 05-25, RM-10593 (filed July 25, 2016) (observing that "ILECs respond to competition on a building-by-building basis and not uniformly across a census block"); Letter from John T. Nakahata, Counsel to Windstream, to Marlene H. Dortch, Secretary, FCC, at 7, WC Docket Nos. 05-25, and 15-247, GN Docket No. 13-5, RM-10593 (filed Mar. 14, 2016) (citing study by TeleGeography finding that Ethernet pricing within a metro area are attributable to factors including the "number of service providers connected to the customer building"). And Verizon itself recognized that *all* business data services at or below 50 Mbps should be treated as noncompetitive. See Letter from Kathleen Grillo, Senior Vice President, Public Policy and Government Affairs, Verizon and Chip Pickering, Chief Executive Officer, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, at 1-2, WC Dockets No. 16-143 and 05-25, RM-10593 (filed Aug. 9, 2016).

²⁰ Verizon Oct. 31, 2016 Ex Parte at 1.

locations of 100 Mbps or less in total demand, 84 percent are served only by the ILEC.²¹ The Commission should not turn a blind eye to these many locations where regulation is needed to advance competition for consumers. The fact of the matter is that last-mile access is a bottleneck input for provisioning service to *most* business data service customers, and the Parity Pricing Principle is needed to ensure those customers benefit from competitive choice in the communications solutions they seek.

A simple example shows why these ILEC-only served locations remain critical, bottleneck inputs. Take, for example, a hospital that serves as a hub for ten satellite clinics. Say, for example, that an ILEC, Windstream, and one other provider all have fiber facilities that reach the hospital, but that the ILEC is the only entity that has facilities reaching the ten satellite clinics. In that situation, if the hospital seeks to bid for a communications solution that includes both it and its ten satellite clinics, no entity other than the ILEC can bid without purchasing services from the ILEC. The only scenario in which the ILEC would not possess critical bottleneck inputs to the production of the complete eleven location communications solution would be if barriers to deployment of new last-mile facilities were so low that those facilities could be constructed quickly to all ten satellite locations. To describe this scenario demonstrates how implausible it is – especially if these satellite clinics each utilize 100 Mbps or less in total bandwidth. As Windstream has previously catalogued, competitive providers have placed substantial testimony in the record that deployments are extremely unlikely to be economically feasible for locations of 100 Mbps or less.²² And even if one or two of those locations somehow

²¹ See Marc Rysman, *Empirics of Business Data Services*, 31 FCC Rcd. at 4935 (“Rysman White Paper”), attached as Appendix B to *FNPRM*; Windstream Oct. 21, 2016 Ex Parte at 2”) (showing that in buildings with 100 Mbps or less in cumulative BDS demand, 84.1 percent are served by only the ILEC and only 0.6 percent have two or more alternatives to the ILEC).

²² See Third Declaration of Matthew J. Loch ¶ 13, appended as Attachment A to Reply Comments of TDS Metrocom, LLC, WC Docket No. 05-25, RM-10593 (filed Feb. 19, 2016) (emphasis added). See also Comments of TDS Metrocom, LLC at 11-12, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (filed June 28, 2016); Declaration of John Merriman on Behalf of Level 3 Communications, LLC ¶ 6, attached as Appendix to Comments of Birch, EarthLink, and Level 3, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (filed June 28, 2016); Declaration of John Merriman on Behalf of Level 3 Communications, LLC ¶ 13, attached as Appendix to Reply Comments of Birch, EarthLink, and Level 3, WC Docket No. 05-25, RM-10593 (filed Feb. 19, 2016); Letter from Thomas Jones, Counsel for Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, at 1-2 (filed July 14, 2016); Letter from Wendy Cassity, VP, General Counsel and Secretary, Zayo, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, at 6 (filed Oct. 4, 2016) (stating that “BDS below 50 Mbps should be presumed non-competitive”); Draft [sic] Declaration of George Kuzmanovski ¶ 8, appended to Comments of XO Communications, LLC on the Further Notice of Proposed Rulemaking, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) (noting that “[w]hile XO has picked up the pace of leveraging its existing networks . . . in the majority of instances, for XO, the ILEC is the only entity capable of offering . . . last-mile access”). See

might be able to be reached by an alternative provider (consistent with the national averages), that would still leave eight or nine ILEC-only locations.²³ To be able to provide finished solution encompassing all eleven locations, any competitive provider other than the ILEC would be dependent upon wholesale access from the ILEC and would be substantially vulnerable to the ILEC raising its prices for the eight or nine ILEC-only locations in order to shut down competition to provide that finished service.

Likely because the number of ILEC-only locations is so high and barriers to entry remain, Verizon argues that the Chairman's Fact Sheet does not treat any Ethernet provider as if it has market power. But the Fact Sheet does not actually say that. The Fact Sheet says, "[T]he Order applies a light-touch regulatory approach that promotes continued investment while ensuring just and reasonable prices and other terms."²⁴ When the Fact Sheet stated that the draft Order would "level the playing field for all packet-based and circuit-based BDS providers delivering speeds in excess of 45 Mbps (DS3) by granting uniform forbearance to certain portions of Title II, including dominant carrier and tariffing requirements," it did not follow the logic of Verizon's construction to eliminate application of statutes requiring rates to be just, reasonable, and not unreasonably discriminatory – requirements from which the Commission never granted forbearance. Nor does it logically preclude applying specific principles for explicating when rates are – or are not – just, reasonable, and not unreasonably discriminatory. Moreover, the Commission has processes that recognize that a rule need not apply perfectly to all situations; if it does not, a waiver is possible.²⁵

Notably, in his declaration on which Verizon relies, Mr. Sidak does not confront the actual numbers regarding the substantial majority of locations with only one business data service provider – and the extreme paucity of locations with more than two alternatives to the ILEC. While he asserts that facilities-based competition weakens Prof. Willig's analysis, Mr. Sidak himself never demonstrates that the facilities-based competition on which he relies is significant across the substantial majority of locations, or that there is a lack of significant barriers to entry, notwithstanding CLEC testimony in the record. There is certainly no support in the record that the market for business data services approaches perfect contestability – which requires entry and exit to be perfectly easy and costless – i.e., "a competitor can enter without

also Comments of the American Cable Association at 38, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (filed June 28, 2016) (acknowledging that "low-demand customer[s] may only be attractive to a provider—typically the ILEC—that already has incurred the fixed costs of deploying a network in that immediate vicinity"); Jon Brodtkin, *Comcast Says It's Too Expensive to Compete Against Other Cable Companies*, ARS TECHNICA (Sept. 24, 2014), <http://arstechnica.com/business/2014/09/comcast-says-its-too-expensive-to-compete-against-other-cable-companies/>.

²³ See *supra* note 21 and accompanying text.

²⁴ Fact Sheet at 2.

²⁵ See 47 C.F.R. § 1.3 (stating that the Commission may grant a request for waiver where "if good cause therefor is shown").

incurring any costs to which incumbents are not subject,” including “any sunk investments—that is, to make outlays that cannot be quickly and costlessly retrieved.”²⁶ Indeed, if the input market were perfectly contestable (or even nearly so), there would be little need to be concerned about the potential for anticompetitive price squeezes. But the presence of these entry barriers means that ILECs have the ability to raise input prices above competitive levels and thereby to engage in unreasonably discriminatory pricing.

In any event, establishing a rebuttable principle for the complaint process that presumes that the wholesale price for Ethernet be at or below the level the ILEC implicitly charges to its retail end user as part of the finished service would permit the Commission to screen out the rare situation in which a location has actual, facilities-based competition to provide the business data service input. The data suggests this will be extraordinarily rare: Across all locations, less than one percent had more than two facilities-based providers, and for locations of 100 Mbps or less cumulative demand, approximately 0.6 percent had more than two facilities-based providers.²⁷ Moreover, as the Fact Sheet proposes for the complaint process in general, the Parity Pricing Principle need not be applied to new entrants and parties with small shares of facilities-based business data services connections. Covering the largest provider in each geographic area—the ILEC – will be sufficient for a long time to come.

III. The Parity Pricing Principle Appropriately Accounts for ILEC Opportunity Costs.

Verizon and Mr. Sidak incorrectly argue that Prof. Willig and Windstream ignore relevant retail opportunity costs.²⁸ That is not the case, as Prof. Willig expressly begins the Parity Pricing Principle with the retail price of the final product, and then subtracts the bottleneck owner’s incremental cost of all other inputs, other than the bottleneck input, that are required to supply the final product; the same is true for Windstream’s proposed rule.²⁹ Prof. Willig, with co-authors Profs. William Baumol and Janusz Ordover, has demonstrated that this approach to determining the input price accounts for the bottleneck provider’s opportunity cost.³⁰ Accordingly, there is no merit in Verizon and Mr. Sidak’s claim that the Parity Pricing Principle endorsed by Prof. Willig and Windstream ignores relevant foregone opportunity costs embedded

²⁶ Baumol & Sidak, *supra* note 8, at 42-43.

²⁷ Rysman White Paper, 31 FCC Rcd. at 4933, Table 7; Attachment to Windstream Oct. 21, 2016 Ex Parte.

²⁸ See Verizon Oct. 31, 2016 Ex Parte at 4-5; Declaration of J. Gregory Sidak ¶¶ 21-22 (“Sidak Declaration”), appended as Attachment A to Verizon Oct. 31, 2016 Ex Parte.

²⁹ Willig Declaration ¶ 21; Proposed Rule (d), attached to Letter from John T. Nakahata, Counsel to Windstream, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 05-25, RM-10593 (filed Oct. 17, 2016).

³⁰ See William J. Baumol, Janusz A. Ordover & Robert D. Willig, *Pricing Parity and Its Critics: A Necessary Condition for Efficiency in the Provision of Bottleneck Services to Competitors*, 14 YALE J. REG. 145, 150-151 (1997)

in the price of the final product that exceed the net avoided costs,³¹ and thus this allegation is not a reason that the Principle should be avoided in assessing whether an ILEC is charging an unreasonably discriminatory, or unjust and unreasonable, input rate for business data services.

Indeed, as both Sidak and Willig separately have observed, the Parity Pricing Principle does not deprive the bottleneck input seller of its monopoly rents on the sales of inputs.³² In particular, Prof. Willig explains that pricing according to the Parity Pricing Rule “does not suppress incentives for investment by the monopolist or duopolist and, in fact, enhances them.”³³ This is because the Parity Pricing Principle – in contrast to unbundling – does not “curtail the ability of the bottleneck owner to attain earnings from its investment in its bottleneck facilities”; instead, it “boosts incentives to invest in the provision of better and more cost effective retail service.”³⁴ For this reason, when various ILECs proposed the Efficient Component Pricing Rule as the pricing standard for unbundled network elements, the Commission previously rejected use of that standard as too generous to the ILECs.³⁵ It is ironic that in the context of business data services, Verizon and USTelecom now object to the same principle.

Verizon and Sidak latch on to the term “opportunity cost” to suggest that the proper input price should include the margins from every possible package of retail products. Even if they mean to exclude capital costs for investment specific to finished products from the scope of margins that should be added to the input price, that is like saying that if there were a tire monopoly integrated into car production, the proper input calculated price of tires calculated according to the Parity Pricing Principle should always assume that the finished product was a fully loaded Rolls Royce. That would clearly lead to a hyper-inflated input price for tires – and one that would make it very difficult for anyone other than the tire company to produce an entry-level car. There is no reason for such a result. To be administrable and protect competition for both slimmer and more robust product packages, the Commission should use the most basic finished product using the business data service input – such as a simple private line or WAN – as the basis for calculating the input price according to the Parity Pricing Principle.

IV. Applying the Parity Pricing Principle Is Both Consistent with and Necessary to Meet Requirements of Sections 201(b) and 202(a).

As discussed above, the Parity Pricing Principle is a necessary component of determining whether an input price is not unreasonably discriminatory, and it therefore does not, as

³¹ See Verizon Oct. 31, 2016 Ex Parte at 5; Sidak Declaration ¶ 28.

³² Baumol, Ordover & Willig, *Pricing Parity and Its Critics*, *supra* note 30, at 150.

³³ Willig Declaration ¶ 26.

³⁴ *Id.*

³⁵ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, FCC 96-325, 11 FCC Rcd. 15499, 15,859-60 ¶¶ 709-711 (1996).

USTelecom claims, violate Section 202(a).³⁶ Windstream and Ad Hoc addressed this argument in their joint ex parte filed November 3, 2016.³⁷ USTelecom's argument depends upon treating end-user purchasers that integrate inputs in a manner different than carriers. But as Windstream and Ad Hoc set forth, that is not necessary to implement the Parity Pricing Principle and thereby to protect competition to provide finished communications solutions. At bottom, what the Parity Pricing Principle recognizes is that there are cost differences in providing finished solutions and providing only inputs. It cannot be a violation of Sections 201(b) and 202(a) for the Commission to put in place backstop protections that recognize those cost differences.

* * *

As the Commission moves forward toward adopting "light touch" rules and principles to guide a complaint process, it should ensure that the presumptions it adopts for the relationship between wholesale and retail pricing curb attempts of market leaders to drive out efficient competition in downstream market. That effort can be guided, in part, by the Parity Pricing Principle, and prices not meeting that standard should be presumed to be unreasonable. Unless the Commission actually articulates this principle as the standard to be applied when comparing wholesale to retail rates, it will be difficult for parties to bargain in the shadow of the law, and for meaningful relief to be granted in the case of a proved violation.

Please contact me if you have any questions.

Sincerely,



John T. Nakahata

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³⁶ See USTelecom Nov. 4, 2016 Ex Parte at 3-4.

³⁷ See Windstream and Ad Hoc Letter at 5-7.